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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 304.

THOMAS MURPHY, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

BERNHARD ARNSON AND ELLIS WILZINSKI, AS ARNSON & WILZINSKI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW-YORK.

FILED NOVEMBER 6, 1875.

SUPREME COURT OF THE UNITED STATES.

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vs.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges [SEAL.] of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Bernhard Arnson and Eliss Wilzinski, plaintiffs, and Thomas Murphy, defendant, a manifest error hath happened, to the great damage of the said Thomas Murphy, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid, on the third Monday of the October term of 1875, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety.

KENNETH G. WHITE.

Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed October 9, 1875.

SAM'L BLATCHFORD.

Filed Oct. 9, 1875.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto,

2 do hereby certify that the following pages, numbered from one to 32 inclusive, contains a true and complete transcript of the record and proceedings had in said court, in the case of Thomas Murphy, plaintiff in error, against Bernhard Arnson and Ellis Wilzinski, defendants in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this third day of November, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the one hundreth.

[SEAL.] KENNETH G. WHITE,
Clerk.

3 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at

the United States court-buildings in the city of New York, of the term of April, 1871, to wit, of the 6th day of October, in the year of our Lord one thousand eight hundred and seventy-one.

Witness the honorable Lewis B. Woodruff, one of the judges of the said circuit court.

KENNETH G. WHITE,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 30th day of September, 1871, in April term of that year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came Bernhard Arnson and Ellis Wilzinski,
4 by Kaufmann, Frank & Pryor, their attorney', and brought into the said court, before the aforesaid judges thereof then there, their certain declaration against Thomas Murphy, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

5 Circuit court of the United States for the southern district of New York.

BERNHARD ARNSON & ELLIS WILZINSKI, comprising the firm of Arnson & Wilzinski, plaintiffs,
against
THOMAS MURPHY, COLLECTOR OF THE PORT OF New York, defendant. } No. 1.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The plaintiffs, by Sigismund Kaufmann, their attorney, come here into court, and suggest and give the court now here to understand and be informed that heretofore, to wit, on the fifth day of July, 1871, an action was commenced in the supreme court of the State of New York, in and for the city and county of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the
6 office of the clerk of the city and county of New York, he being also the clerk of the said supreme court, on 16th day of September, 1871; that the defendant afterwards, by Noah Davis, esq., his attorney, duly appeared in said action, and such proceedings were thereupon had, that afterwards, and on the twenty-fifth day of September, in the year of our Lord one thousand eight hundred and seventy-one, the said action was in due form of law removed, by writ of certiorari, for further prosecution and trial, into this court, according to the act of Congress in such case made and provided, and the clerk of the said supreme court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs now, according to law, by their attorneys afore-

said, complain of the defendant herein, in a plea of trespass on the case.

7 For that whereas the said defendant, on or about the 18th day of March, 1871, at the city of New York, in the southern district of New York aforesaid, was indebted to the said plaintiffs in the sum of two hundred dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant; and for other moneys by said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested.

8 And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the plaintiffs in the further sum of two hundred dollars, of lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be hereunto afterwards requested. Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof, to the said

9 plaintiffs, has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of two hundred dollars.

And therefore the plaintiffs bring suit, &c.

10 United States circuit court, southern district of New York.

THOMAS MURPHY *ads.* BERNHARD ARNSON ET AL. } No. 1. Plea.

And the said defendant, by Noah Davis, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant; and of this he puts himself upon the country, and the said plaintiffs *does* the like, &c.

NOAH DAVIS,
Defendant's Attorney.

To KAUFMANN, FRANK & PRYOR, Esq.,
Plaintiffs' Attorney.

11 Therefore the issue above joined is ordered by the said circuit court to be tried at the court appointed to be held at the United

States court buildings, 41 Chambers street, in the city of New York, and in the district and circuit aforesaid, on the first Monday of April, 1874.

A day is given to the parties aforesaid, before the judges aforesaid, at the U. S. court buildings in the city of New York, on the first Monday of April, 1874.

And now at this day, to wit, on the first Monday of April, in the year of our Lord one thousand eight hundred and seventy-four, before the said judges of the said circuit court at the U. S. court buildings in the city of New York, come the plaintiffs by their attorneys aforesaid, and Nathaniel Shipman, esquire, district judge of the United States for the district of Connecticut, in the second circuit, before whom the said issue was tried, hath sent hither his record had before him in these words:

Afterwards, that is to say, on the day and at the place within contained, before Nathaniel Shipman, esquire, district judge of the United States for the district of Connecticut, in the second circuit within
12 named, according to the form of the statute in such case made and provided, come as well the within-named plaintiffs, by Kaufman, Frank & Pryor, their attorneys, as the within-named defendant, by his attorney, George Bliss, and the jurors of the jury summoned to try the said issue, being called, also come, who to speak the truth of the matters within contained being chosen, tried, and sworn, say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiffs have within complained against him; and they assess the damages of the said plaintiffs by reason of the premises over and above their costs and charges by them about their suit in this behalf expended to one hundred and thirty-two dollars in gold coin, as principal, and twenty-five dollars and fifty-two cents in currency as interest, and for their costs and charges to six cents.

Therefore it is considered that the said plaintiffs do recover
13 against the said defendant their said damages, costs, and charges by the jurors aforesaid in form aforesaid assessed, and also seventy-eight dollars and eighty cents for their said costs and charges by the said court now here adjudged of increase to the said plaintiffs and with their assent, which said damages, costs, and charges in the whole amount to one hundred and thirty-two dollars in gold coin and one hundred and four dollars and thirty-two cents in currency.

Judgment signed this 9th day of October, 1875.

R. E. STILWELL,
Deputy Clerk.

(Indorsed:) U. S. circuit court. Bernhard Arnson & al. vs. Thomas Murphy. Judgment record. Kaufmann, Frank & Pryor, pl'ffs' att'y'. Filed Oct. 9, 1875.

14 *Bill of exceptions.*

United States circuit court, southern district of New York.

BERNHARD ARNSON, ELLIS WILZINSKI
vs.
THOMAS MURPHY.

This case came on for trial before Hon. N. Shipman, district judge, and a jury, at the April term of this court, 1874, and continued on May

22nd, June 2nd, and June 3rd, 1874. The following proceedings, among others, occurred:

Plaintiffs, to sustain the issue upon their part, put in evidence an entry and invoice of an importation by them of ten cases of nitro-benzole, on which the duty was exacted by the defendant as collector of the port of New York at the rate of fifty per cent. ad valorem. The duty paid by the plaintiffs, according to that rate, was two hundred and twenty dollars. The plaintiffs protested against this liquidation of duty by the collector by the following protest:

15 [Arnson & Wilzinski, importers, commission merchants, 20 Cedar street, New York.]

NEW YORK, *March 30th*, 1871.

Hon. THOMAS MURPHY,
Collector of the Port of New York, New York City:

SIR: We do hereby protest against the payment of fifty per cent. charged on nitro-benzol' contained in this entry of March 15th, imported p'r steamer Batavia, from Liverpool, claiming that under existing laws said goods are only liable to a duty of twenty per cent., or forty cents p'r gallon, because—

Nitro-benzol' is a manufactured article, non-enumerated, which are charged twenty per cent., or forty cents p'r gallon, according to sect. 20 of 1842, and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable.

Nitro-benzol' is manufactured of benzol' and nitric acid, benzol' paying a duty of forty cents per gallon. We pay the amount exacted in order to get possession of the goods, and claim to have the difference refunded.

Your most obed't servants,

ARNSON & WILZINSKI.

16 And thereafter duly appealed to the Secretary of the Treasury March 31st, 1871, the fact of which appeal was at the trial conceded by defendant. Plaintiffs offered in evidence their letter of appeal, to which defendant duly objected, on the ground that the fact of the appeal was conceded, that the statements contained in the said letter were no evidence of the facts stated, and should not be read to the jury. The court admitted said letter of appeal solely as evidence of the fact of the appeal, and permitted said letter to be read to the jury.

To which ruling the defendant's counsel duly excepted.

Plaintiffs' counsel then read said letter of appeal to the jury, which is as follows:

17 Certified copy of appeal.

NEW YORK, *March 31st*, 1871.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury, Washington, D. C.:

DEAR SIR: The appraiser of the port of New York has imposed on our importation of nitro-benzol' a duty of 50 per cent., ranging the article as an essential oil. We have paid the duty under protest, and beg to appeal to your hon. sir for a redress, upon the ground that no authority in the science of chemistry can assert that nitro-benzol' is an essential oil. Upon our inquiring in reference to it of Professor R. Ogden Doremus, M. D., the highest authority in the field of chemistry in the U. S., we have received his answer, which we take pleasure to enclose,

and should this not prove sufficient, we are willing to procure testimonies of like tenor from the most renowned chemists of Europe; nitro-benzol' being a composition of nitric acid and benzol', the duty charged thereon as a manufactured article is 20 per cent., or referring to section 20 of 1842, wherein it says, "and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be charg'able"; and whereas nitric acid is free and benzol' paying 40 cents per gallon, the duty on nitro-benzol' should be assessed accordingly. Awaiting
18 your early favorabl' decision,

We are, hon. sir, your, with due respect, most ob'd' servants,
ARNSON & WILZINSKI.

19 The Secretary of the Treasury decided upon the said appeal April 10th, 1871.

Plaintiffs then called witnesses, and were proceeding to examine the first witness-in-chief concerning the character of the article imported, when defendant's counsel objected to any testimony in that respect in plaintiffs' behalf, on the ground that the protest was insufficient, indefinite, ambiguous, and uncertain, and did not therein set forth distinctly and specifically the grounds of the plaintiffs' objection to the alleged erroneous exaction of duty by the collector, and could not be the basis, therefore, of any recovery in this action, and no testimony could be given under it; which objection the court overruled, and defendant's counsel duly excepted. Testimony was then given by a variety of witnesses on the part of the plaintiffs, tending to show that the article in question was made by mixing benzole and nitric acid, which combined by reason of their chemical affinity, and were then refined and cleaned by distillation, and sold as nitro-benzole, and as oil of myrbane;
20 that the article varied in quality according to the degrees of its refinement, and was sold to druggists and soap manufacturers, and to the trade generally, and usually by the thousand pounds, or in lots running from 500 to 1,000 pounds.

Plaintiffs then rested.

It was admitted by the defendant that nitro-benzole was made from nitric acid and benzole, and as described by plaintiffs' witnesses.

The defendant then introduced testimony to sustain the issues on his part, and examined witnesses tending to show that the article in question was a well-known article of commerce, commercially known as oil of myrbane. At the outset of such testimony, the defendant's counsel asked of their first witness the following question:

2. "Do you know by what class of dealers it is dealt in, and what article it most resembles, in the use to which it is applied, and for which it is sold as an article of commerce?"

21 Plaintiffs' counsel objected upon the ground that testimony as to the uses of the article was immaterial and irrelevant, inasmuch as it was dutiable according to its component materials, and not by reason of the similitude of its uses to enumerated articles chargeable with duty; which objection the court then and there overruled, and said testimony was then resumed.

The defendant's testimony then tended to show that the article in question is manufactured and sold for use in perfuming and flavoring, used in the common course soap, to kill the smell, and also to give a sort of bitter-almond smell, and in the uses to which it is applied resembles the real oil of almonds, which is an essential oil, and is commercially known as artificial oil of bitter almonds, as well as nitro-benzole and oil

of myrbane; and that in fact it resembles essential oil in the uses to which it is put as a marketable commodity more than anything else, and was used as a substitute for an essential oil, being cheaper.

22 The defendant then rested.

Plaintiffs' counsel then called witnesses in rebuttal, who gave testimony tending to show that the resemblance between oil of myrbane and the essential oil of bitter almonds is factitious, and that nitro-benzole did not resemble in the uses to which it was applied the essential oil of bitter almonds in particular, nor the essential oils in general.

The foregoing comprises substantially all the tendency of the evidence for the respective parties adduced upon the trial.

The testimony being closed, the defendant's counsel moved that the court direct the jury to find a verdict for the defendant, upon the ground that the testimony in this case was uniform and uncontradicted, to the effect that the use of the article in question as an article of commerce in this country was similar to the uses to which essential oils are put; the article must therefore be deemed to be an enumerated article,

23 dutiable as all other essential oils at fifty per cent. ad valorem.

Which motion was denied, and defendant's counsel duly excepted.

Defendant's counsel then requested the court to charge the jury as follows, and that the questions of fact be submitted to the jury, viz:

I. If the article in question is known and used in commerce as the artificial oil of almonds, that is a circumstance towards establishing the resemblance contended for by defendant.

II. If the article is commercially known as oil of myrbane, and as such is ordinarily used as a substitute for an essential oil, then that is one of the resemblances contemplated by the statute.

III. The words in the statute that the resemblance shall be similar in the "use to which it may be applied," apply to a dutiable article, as an article of import, not to its experimental utility, and must be understood in the sense in which such an expression would be re-

24 ceived ordinarily among men engaged in commercial affairs.

IV. In this case, then, the question is, what is the use to which, as an article of import or commerce, it is applied, and not to what it is not imported for.

V. If the article, then, bears a similitude in the use to which, as an article of commerce, it may be applied, to an essential oil, then the verdict must be for the defendant.

VI. If the jury believe that the essential oil of bitter almonds is or has been used for the purposes of scenting soaps, the verdict must be for the defendant.

VII. If the jury believe that the article imported has been distilled after the mixture of the nitric acid and benzole, for the purpose of being used as a substitute for an essential oil, and thereafter is imported for that purpose, the verdict must be for the defendant.

VIII. If the jury believe that the essential oil of bitter almonds

25 is or has been used for making perfumery, and that nitro-benzole may be used for making perfumery, the verdict should be for the defendant.

IX. If nitro-benzole may be used as a substitute for the essential oil of bitter almonds in any use to which the essential oil of bitter almonds is or has been applied, then the verdict of the jury must be for the defendant.

X. That since it is admitted on both sides that the nitro-benzole of commerce is the result of a chemical combination, which is then distilled,

it ceases to be, in the view of the law, a manufactured substance, composed of two or more materials, and consequently the plaintiffs cannot recover.

XI. If the jury believe that a chemical alteration has taken place in the materials of which nitro-benzole is composed, both of which are destroyed, and that a new substance is thereby created which has not the properties of either of its component materials, the verdict must be for the defendant.

26 XII. That the jury will find as a matter of fact that this is a crude article.

Plaintiffs' counsel thereupon moved that the court direct a verdict for the plaintiff, on the ground that, it being uncontradicted that nitro-benzole is an article manufactured from two materials, nitric acid and benzole, *that* the duty upon it should be assessed under the last clause of the 20th section of the act of 1842, and at the highest rate at which any of its component parts may be chargeable. That of the two materials of which it is composed, benzole pays the highest duty, viz, 40 cents per gallon, and that, therefore, nitro-benzole should pay a duty of 40 cents per gallon, and no more.

The court charged the jury that as matter of law, upon the uncontradicted facts in the case, the duty upon the article should have been assessed as claimed by the plaintiffs, and directed a verdict for the

27 plaintiffs; and defendant's counsel duly excepted, and also excepted to the refusals of the court, as requested by defendants.

The jury then, under the direction of the court, found a verdict for the plaintiffs for $132 and interest, amounting, altogether, to $132 in gold, with interest in gold at the rate of six per cent. from the 14th March, 1871.

And inasmuch as the aforesaid matters of fact and of law and the said exceptions do not appear by the record of said trial and verdict, therefore, on the prayer of the said defendant, by his counsel, the said judge has set his hand and seal to this bill of exceptions this 27th day of October, 1875, at the term of the said circuit court as aforesaid.

[L. S.] N. SHIPMAN, *Judge.*

28 (Indorsed:) U. S. circuit court, southern district of New York. Bernhard Arnson et als. versus Thomas Murphy. Copy. Bill of exceptions. Filed Oct. 27, 1875.

29 Supreme Court of the United States

THOMAS MURPHY, PLAINTIFF IN ERROR,
vs.
BERNHARD ARNSON AND ELLIS WILZINSKIE,
defendants in error.

Of October term in the year of our Lord one thousand eight hundred and seventy-five.

Afterwards, to wit, on the third Monday in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Thomas Murphy, by George Bliss, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid there is error in the several rulings of the court, to which exception has been taken, and that by the record aforesaid it appears that judgment aforesaid, in form aforesaid given, was given for the said

30 defendants against the said plaintiff, whereas by law of the

land said judgment ought to have been given for the said plaintiff in error against the said defendants in error; and the said plaintiff prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, as the same appear more fully therein, may be reversed, annulled, and altogether held for nothing, and that he (the plaintiff) may be restored to those things which he has lost by reason of the said judgment.

GEORGE BLISS,
U. S. Att'y for Pl'ff in Error.

(Endorsed:) U. S. Supreme Court. Thomas Murphy, pl'ff in error, v. Bernhard Arnson et al., def'ts in error. Assignment of errors. George Bliss, U. S. att'y for pl'ff. Filed Nov. 4, 1875.

31 U. S. Supreme Court.

THOMAS C. MURPHY, PLAINTIFF IN ERROR,
v.
BERNHARD ARNSON & ELLIS WILZINSKI, DEFENDANTS IN ERROR.

I hereby admit due service for the above-named Bernhard Arnson and Ellis Wilzinski, defendants in error, of the annexed writ of error and citation.

Dated, New York, Oct. 9, 1875.

KAUFMAN, FRANK & PRYOR,
Attorneys for Bernhard Arnson & Ellis Wilzinski, Defendants in Error.

(Endorsed:) Filed Oct. 9, 1875.

32 UNITED STATES OF AMERICA, *ss:*

To Bernhard Arnson and Ellis Wilzinski, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the third Monday of the October term of 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Thomas Murphy is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York, the ninth day of October, A. D. 1875.

SAM'L BLATCHFORD.

(Indorsed:) Filed Oct. 9, 1875.

33 Supreme Court of the United States.

THOMAS MURPHY, PL'FF IN ERROR,
vs.
BERNHARD ARNSEN, DEF'T IN ERROR.

And afterwards, to wit, on the third Monday of October, in October term, in the year of our Lord one thousand eight hundred and seventy-six,

the said Bernhard Arnsen, by Geo. S. Sedgwick, his attorney, freely comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judicature, before the justi thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

GEORGE S. SEDGWICK,
Att'y for Def't in Error,

STEPHEN G. CLARKE,
Of Counsel.

(Indorsed:) U. S. Supreme C't, No. 550. Thomas Murphy, pl'ff in error, vs. Bernhard Arnsen, def't in error. Joinder in error. George S. Sedgwick, att'y for def't in error. Filed 25 November, 1876.

(Indorsement on cover:) No. 304. Thomas Murphy, collector of the port of New York, plaintiff in error, vs. Bernhard Arnson and Ellis Wilzinski, as Arnson & Wilzinski. S. New York C. C. U. S. Filed 6th November, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THOS. MURPHY, COLLECTOR, &C.,
vs.
BERNHARD ARNSON AND ANOTHER. } No. 304.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THOS. MURPHY, COLLECTOR, &C., *vs.* BERNHARD ARNSON AND ANOTHER. } No. 304.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

In March, 1871, Arnson & Wilzinski, plaintiffs below, imported into New York a quantity of nitro-benzole, which was obtained by the chemical action of its constituents—benzole and nitric acid—upon each other. (Record, 6, middle.) It was then refined and cleaned by distillation, and sold as nitro benzole and as "oil of myrbane" to druggists, soap manufacturers, "and to the trade generally." (*Ib.*) The defense below introduced testimony that this was a well-known article of commerce commercially known as oil of myrbane, used for perfuming and flavoring, and also commercially known as "artificial oil of bitter almonds," as well as by its other names (Record, 6, lower half); "and that, in fact, it resembles

essential oil in the uses to which it is put, as a marketable commodity, more than anything else, and was used as a substitute for an essential oil, being cheaper." (Record, 7, top.) There was testimony to rebut this, put in by the plaintiffs below.

The collector exacted duty upon this nitro-benzole as upon an "essential oil, not otherwise provided for," 50 per cent., under act of July 14, 1862, c. 163, § 4 (12 Stats., 543), whereas the importers contended that it was a non-enumerated article, and that 40 cents a gallon was the proper duty, being the highest rate payable on either constituent, agreeably to the similitude clause of the act of August 30, 1842, c. 270, § 20 (5 Stats., 548).

Upon this evidence the court directed a verdict for the plaintiffs.

ASSIGNMENT OF ERRORS.

1. The plaintiff in error assigns for error the refusal of the judge to direct a verdict in his favor (Record 7, folios 22 and 23), and the charge that "as matter of law, upon the uncontradicted facts in the case, the article should have been assessed as claimed by the plaintiff," and the direction to find a verdict in their favor. (Record, 8, folio 26.)

2. Also, the refusal to submit the questions of fact to the jury and to charge as requested, as follows, viz:

1st. If the article in question is known and used in commerce as the artificial oil of almonds, that is a circumstance toward establishing the resemblance contended for by defendant.

2d. If the article is commercially known as oil of myrbane, and as such is ordinarily used as a substitute

for an essential oil, then that is one of the resemblances contemplated by the statute.

3d. The words in the statute that the resemblance shall be similar in the "use of which it may be applied," apply to a dutiable article, as an article of import, not to its experimental utility, and must be understood in the sense in which such an expression would be received ordinarily among men engaged in commercial affairs.

4th. In this case, then, the question is, what is the use to which, as an article of import or commerce, it is applied, and not to what it is not imported for.

5th. If the article, then, bears a similitude in the use to which, as an article of commerce, it may be applied, to an essential oil, then the verdict must be for the defendant.

6th. If the jury believe that the essential oil of bitter almonds is or has been used for the purposes of scenting soaps, the verdict must be for the defendant.

7th. If the jury believe that the article imported has been distilled after the mixture of the nitric acid and benzole for the purpose of being used as a substitute for an essential oil, and thereafter is imported for that purpose, the verdict must be for the defendant.

8th. If the jury believe that the essential oil of bitter almonds is or has been used for making perfumery, and that nitro-benzole may be used for making perfumery, the verdict should be for the defendant.

9th. If nitro-benzole may be used as a substitute for the essential oil of bitter almonds in any use to which the essential oil of bitter almonds is or has been applied, then the verdict of the jury must be for the defendant.

10th. That since it is admitted on both sides that the

nitro-benzole of commerce is the result of a chemical combination, which is then distilled, it ceases to be, in the view of the law, a manufactured substance, composed of two or more materials, and consequently the plaintiffs cannot recover.

11th. If the jury believe that a chemical alteration has taken place in the materials of which nitro-benzole is composed, both of which are destroyed, and that a new substance is thereby created which has not the properties of either of its component materials, the verdict must be for the defendant.

12th. That the jury will find as a matter of fact that this is a crude article. (Record, 7, 8.)

BRIEF.

I.

Was the importation an essential oil, within the meaning of the tariff, or was it a non-enumerated article?

The inquiry is whether it was known and treated as and for an essential oil by those dealing in and using it; not whether it would be so considered by chemists, or in chemical definition.

There was, at least, evidence enough upon this point to require its submission to the jury.

II.

If not to be treated as an essential oil, then there was no specific tariff designation applicable to it, and it is a non-enumerated article. But, if it be non-enumerated, it by no means follows that the rate of duty is, as was held below, the highest paid by either constituent ele-

ment of the compound; on the contrary, the correct application of the similitude clause of the statute of August 30, 1842, c. 270, § 20 (5 Stats., 548), vindicates the action of the collector. That section commences by declaring "There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, *quality*, texture, *or the use to which it may be applied* to any enumerated article chargeable with duty, the same rate of duty which is levied and charged *on the enumerated article which it most resembles in any of the particulars before mentioned;*" and then concludes by saying that if it equally resembles two or more enumerated articles, it shall be charged with the highest rate of duty paid on any such similar article.

But there is not a scintilla of evidence in this case that nitro-benzole in any respect resembles the fluids from which it is compounded. It is the result of a chemical combination, rectification, and distillation. A result so obtained certainly would not *necessarily* resemble the primitive elements. It cannot truly be said as a fact—certainly, then, not *as matter of law*—that the result of chemical action is *similar*, even as to its *material*, to the substances upon which these forces have operated. The truth is, this section, by the words "material, quality, texture," refers to articles like spectacles, in which two or more substances are mechanically joined to make the article imported, which may be a new invention. By *chemical* synthesis *an entirely new substance may be formed*, resembling neither element. The component parts are not regarded, as this court declared in the white-lead case (Meyer *v.* Arthur, 91 U. S., 570.) The action of the air upon the elements in combination, as well as their inter-

action upon each other, may affect the character of the resulting compound. Indeed, the article here imported cannot be said, in any particular, to have any likeness to nitric acid or to benzole. If from its method of construction (so to speak) any inference arises that it resembles either, it is an inference of *fact*, and *should have been left to the jury*, if there were *any* evidence to support it. To us it seems like mere conjecture, and that too without fact or probability to support it.

In its quality, and in "the use to which it may be applied," the evidence clearly shows this article was *so* similar to an essential oil as to be treated and dealt in as identical; hence, the collector rightly so assessed it; either as being an essential oil, or as bearing the closest similitude to that enumerated article, as to material, quality, texture, and use.

EDWIN B. SMITH,
Assistant Attorney-General.

S. Hamilton's Son, Printer, 61 Cedar Street, N.Y.

In the Supreme Court.

THOMAS MURPHY, Collector, &c.,
Plaintiff in Error,
vs.
BERNHARD ARNSON, *et al.*,
Defendants in Error.

No. 304.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The defendants in error imported at New York, in March, 1871, a quantity of nitro-benzole, upon which the plaintiff in error, as collector, exacted a duty of fifty per centum *ad valorem*.

Against the imposition of this duty the importers protested, (Record, fol. 15), claiming that the goods were only liable either to a duty of twenty per centum *ad valorem* as a non-enumerated manufactured article, or, applying section 20 of the Act of 1842, the Similitude Law, (5 Stat. at Large, 548), to a duty of forty cents a gallon.

The collector contended on the trial that nitro-

benzole resembled in smell and some of its uses the oil of almonds, an essential oil, (Record, fol. 21). The defendants, however, controverted this claim, (Record, fol. 22).

The duty assessed was, therefore, sought to be justified by an application of the first clause of section twenty of the Act of 1842; upon the before stated ground that nitro-benzole resembled oil of almonds, and, therefore, dutiable at the same rate as oil of almonds under section five of the Act of July 14, 1862, (12 Stat. at Large, 543), which, among other things, imposes a duty on "all other essential oils, not otherwise provided for, fifty per centum *ad valorem*."

It appeared by uncontradicted evidence, and was conceded on the trial, that nitro-benzole was made by mixing benzole and nitric acid, which combined by reason of their chemical affinity, and were then refined and cleaned by distillation, (Record, fols. 19, 20).

Under the revenue laws in force at that time, nitric acid was free of duty, and benzole was subject to a duty of forty cents a gallon. Section 22, Act July 14, 1870, (16 Stat. at Large, 262), and section three, Act of March 3, 1865, (13 Stat. at Large, 491).

The claim of the defendant in error, supported by the Court below, was that the article in question was dutiable by that clause of the Similitude Act, which provides that "on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

POINTS.

I.

The substantial question presented by the record is, which clause of the twentieth section of the Act

of 1842, the first or last, shall govern in determining the rate of duty upon nitro-benzole. That section reads as follows:

"And be it further enacted, that there shall be levied, collected and paid, on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." (5 Stat. at Large, 565).

The article in question here was non-enumerated, and was manufactured from two materials, and, therefore, by force of the third clause, became for purpose of assessing duty enumerated as benzole.

Stuart *vs.* Maxwell, 16 How., 150;
Marlot *vs.* Lawrence, Blatchf., 608;
Lottimer *vs.* Lawrence, Ib., 613;
Ross *vs.* Peaslee, 2 Curtis C. C., 499.

But it is answered, the article bears a similitude to an enumerated article, and, therefore, comes within the first clause.

We reply, the true construction to be given is one that will harmonize all the provisions, viz., if a non-enumerated article resembles an enumerated article, then it is dutiable as that, but if it equally resembles two, then at the rate of duty which is highest upon those two, and if made from two materials, then at the rate of duty highest upon the materials from which it is made.

That is, each subsequent clause is in fact a proviso upon the precedent clauses; and there can be no question as to its applicability to whatever case comes within its provisions.

II.

The point made on the trial in 10th, 11th, and 12th requests to charge (Record, fols. 25, 26), that nitro-benzole is not a manufactured substance composed of two materials, is unsound, both as to the fact and in its statement of the law.

The statute says: "on all articles manufactured *from* two or more materials," and not on manufactures *of* two or more materials. If the statute were as supposed by the tenth request, there might be some force in that request, and it could be ingeniously argued that, because, in the process of manufacture the identity of the components was destroyed by chemical combinations, the resulting product was not a manufacture of two materials, *i.e.*, a manufacture in which each of the materials appeared; as cotton and wool might each appear united in a textile fabric; and the case of Meyer *vs.* Arthur,, 91 U. S. 570, might be cited to sustain such proposition. But we submit the use of the word *from*, in the statute, suggests, nay renders necessary, a different construction. Although white lead may not be a manufacture *of* lead because the metallic lead has disappeared in its oxide, nevertheless white lead is a manufacture *from*, *i. e.*, out of metallic lead.

Nor is there any apparent reason for applying this statute to only one class of manufactures, viz.: that class in which the original materials appear mechanically joined together. They are not less manufactures from, because the union is a chemical instead of a mechanical one. The chemical union is only more intimate, depending on the materials used and the manipulations given; but the result-

ant is no less a manufacture, and within the plain obvious meaning of the act.

See Lawrence *vs.* Allan, 7 How., 785, 795, 796.
Schriefer *vs.* Wood, 5 Blatchf., 215.

Bouvier in his law dictionery title manufacture, says : "The word is used in the English and American patent laws. This term includes two classes of things : first, all machinery which is to be used and is not the object of sale, and, secondly, substances (such, for example, as medicines) formed by chemical processes, when the vendible substance is the thing produced, and that which operates preserves no permanent form."

III.

Assuming that there was competent evidence tending to show that the article in question bore a "similitude in material, quality, texture, or the use to which it may be applied" to an essential oil, and it uncontradictedly appeared to have been manufactured from two materials, then the Court below was correct in deciding in favor of the rate of duty based upon component materials.

The case thus presented is, in fact, one of double enumeration ; and as to this particular article, one portion of the statute is repugnant to the other. In case of such irreconcilable repugnancy the rule is clear:

"If the latter part of a statute be repugnant to the former part thereof, it shall stand, and so far as it is repugnant be a repeal of the former part, because it was last agreed to by the makers of the statute."

Bacon's Abr. Statutes, D.
Harrington *vs.* Trustees, 10 Wend., 547.
Fowler *vs.* Bull, 46 N. Y., 57, 68.
Sedgwick on Statutory Law, 415.

This rule was applied by Justice Nelson, sitting in the Circuit Court, to solve the problem of a double enumeration in a tariff act.

In the 19th section of the Tariff Act of 1861 (12 Stat. at Large 178) Peruvian bark was made dutiable at ten per centum *ad valorem*, and in the 23d section of the same Act Peruvian bark was included in the list of articles free of duty. Says Nelson, J. "In this difficulty of conflicting claims I know of no other way of solving it than by applying the well-settled rule of construction, in the case of two repugnant provisions of the same Act, which is, that the last provision shall prevail, as speaking the latest and final intent of the law makers."

Powers *v.* Barney, 5 Blatch. 202.

But upon the principle of construction before presented, viz., that the second and third clauses are to be treated as in fact provisos upon the first clause there is no necessity of applying this artificial and arbitrary rule. If, however, the several clauses stand independent then this well-settled rule is the true rule of construction and the proper road out of the difficulty.

In fact, it may be considered in this case that the two rules of construction are not alone identical in their results but also in their underlying reason.

IV.

In Powers *v.* Barney, before cited, Mr. Justice Nelson, in support of his determination that Peruvian bark was free of duty, also says, "Another principle may also be invoked, which is, that in cases of serious ambiguity in the language of the Act, or doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations."

See, also,

United States *v.* Wigglesworth, 2 Story. 369.
Adams *v.* Bancroft, 3 Sumn. 384.
Two Hundred Chests of Tea, 9 Wheat. 438.

Supposing the duty by component material had been the larger in this case, what in the mind of the collector and department would have been the clear construction of the Act?

V.

There is no warrant for the suggestion that nitrobenzole is in fact an essential oil, or so treated; either in the testimony or exceptions; or that it was an enumerated article.

WILLIAM STANLEY,
STEPHEN G. CLARKE,
Counsel for Defts. in Error.

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from a non-summarized article, if not the press

should have found it.

Nikki Brunzel